PERMAN SDN BHD & ORS

v.

EUROPEAN COMMODITIES SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: W-02-743-1997]
21 NOVEMBER 2005

TRUSTS: *Trusts - Declaration - Whether one may declare himself as trustee of someone else's property*

TRUSTS: *Resulting trust - Advancement - Whether resulting trust can arise*

TRUSTS: *Trusts - "Quistclose" trust - Nature and definition of "Quistclose" trust - Rider to the Quistclose principle that once purpose for which money is advanced is achieved beneficial ownership in money vests absolutely in intended recipient*

TRUSTS: *Breach of trust - Tracing remedy - Whether trust money used for some purpose other than intended purpose can be traced into its end product*

TRUSTS: *Breach of trust - Whether person dishonestly assisting trustee in breaching trust can be liable as a fiduciary with a duty to account for the trust money*

TRUSTS: *Trusts - Existence - Standard of proving that an express trust exists - Whether intention to create a trust must be expressed in clear language*

COMPANY LAW: *Separate legal entity - Lifting the veil of incorporation - When can court disregard corporate personality of a limited company*

The plaintiffs were two private limited companies under the control of one Mohamed Aly Rangoonwala, ("Rangoonwala"). A joint venture agreement was entered into between three parties. One of them was the 1st defendant, Perman Sdn Bhd, a private limited company whose shareholding was held equally by one Raja Zainal and his wife, Tengku Zaidah. The other two parties to the joint venture agreement were the 2nd plaintiff and a company called Kumpulan Fima Sdn Bhd. Consequent upon the joint venture agreement, a company called Fimaly Bulking Services Sdn Bhd ("Fimaly") was incorporated.

3% of the shares of Fimaly were held by the 1st defendant. The 1st defendant's 3% stake amounted 149,999 shares. The remaining 1 share was held by Raja Zainal. Rangoonwala contended that since Raja Zainal had no money to subscribe for the shares in Fimaly, Rangoonwala himself had through the plaintiffs, provided Raja Zainal with RM150,000 to pay Fimaly for the 150,000 shares. Raja Zainal paid this RM150,000 into the 1st defendant's account. The 1st defendant then paid for the shares and became, the registered shareholder of the 149,000 shares of Fimaly.

On 1 September 1986, a "Memorandum of Agreement" ("the MOA") was executed between the plaintiffs and Raja Zainal through his holding company Perman Holdings (referred to as R.Z.) which stated that R.Z. was holding 150,000 shares at M$1 each for a total of M$150,000 being paid up value in Fimaly. The MOA stated that this investment of M$150,000 had been put in R.Z.'s name by the plaintiffs and that R.Z. had the option, within the next twenty four months to buy out the shares at par value plus interest. The MoA further provided that if R.Z. decided that he was not interested in buying the shares within the next twenty-four months, then the shares will be at the disposal of the plaintiffs and R.Z. would not have to pay any amount whatsoever.

On 28 January 1993, Raja Zainal and his wife both died in an accident. The 2nd to 4th defendants were later appointed as personal representatives of Raja Zainal's estate. The 3rd and 4th defendants prior to their appointment as personal representatives, executed a declaration of trust over the Fimaly shares and also delivered executed proxy forms and blank share transfers to Rangoonwalla. The Fimaly shares were later sold for a considerable sum of money which sum with interest had been paid into court. The plaintiffs claimed that Raja Zainal held the Fimaly shares under either an express or alternatively a constructive trust. The latter claim of constructive trust was grounded on the plaintiffs having provided the purchase price for the Fimaly shares. The defendants' contended that there was no trust here but merely a debt for which the estate of Raja Zainal may be liable. The trial judge found for the plaintiffs and held that the Fimaly shares were held on trust by Raja Zainal. The trial judge found for the plaintiffs on the basis of an express, and in the alternative, an implied trust, which is another name for the device of the resulting trust. The defendants appealed against that decision.

Held (allowing the appeal)
Per Gopal Sri Ram JCA:

[1] It is only the owner of a property who may declare himself as trustee. The true owner of the Fimaly shares was Perman Sdn Bhd, the 1st defendant, and not Raja Zainal. So if anyone was to be a trustee of the Fimaly shares it must be the 1st defendant and nobody else. For no one, including Raja Zainal, had the power to declare himself a trustee of someone else's property; in this instance the 1st defendant. This is because a company is a separate person from its shareholders. The latter has no interest, legal or beneficial, over the property of the former. (p 762 e, f-g)

[2] There is not a jot of evidence that the 1st defendant ever declared itself a trustee of the plaintiffs in respect of the Fimaly shares. (p 763 a)

[3] The plaintiff's own evidence is that the money was handed to Raja Zainal who paid it into the 1st defendant's account. Following this, the 1st defendant paid those monies to Fimaly, was issued Fimaly shares and became the registered owner of those shares. It follows that the doctrine of a resulting trust has no application to the facts of this case. The only reasonable inference that is to be drawn from the proved and admitted facts is that this is in reality a case of a debt and not an express trust. Looking at the Memorandum of 1 September 1986, there is nothing in it that constitutes Raja Zainal as trustee of any property. It merely confirms the fact that the RM150,000 was an advance from the plaintiffs to Raja Zainal. (p 763 b-d)

[4] For the 1st defendant to be accountable to the plaintiffs for the Fimally shares, the RM150,000 paid to Raja Zainal by the plaintiffs must be trust moneys in the sense that it was to be used for the specific purpose of purchasing the Fimaly shares. If the purpose had failed there would have been a resulting trust in the plaintiffs' favour. Here, Raja Zainal was advanced the RM150,000 for the specific purpose of using it to acquire the Fimaly shares. So he was a trustee of the money. This is called a "Quistclose" trust. In those circumstances, if the money had been used for some purpose other than the purchase of Fimaly shares, that would amount to a breach of trust by Raja Zainal. This would entitle the plaintiffs to trace the money into the product of the breach of trust. And, if the 1st defendant dishonestly assisted Raja Zainal in the breach, then it would be liable as a fiduciary with a duty to account for the trust money. But the RM150,000 was in fact used for the very purpose for which it was paid over to Raja Zainal. (p 763 e-h)

[5] The rider to the Quistclose principle is that once the purpose for which the money was advanced is achieved, the beneficial ownership in the money vests absolutely in the intended recipient, in this case, the 1st defendant. And when the shares were registered in the name of the 1st defendant, it became the sole beneficial owner of those shares. Thereafter no other person had any right to deal with them. The advance to Raja Zainal by the plaintiffs was in truth and fact a loan. (pp 763 h & 764 a)

[6] The primary temporary trust for the purpose of acquiring the Fimaly shares was carried out thereby resulting in a pure loan relationship. Accordingly, there was no resulting trust. (p 764 e)

[7] The standard of proving that an express trust exists in given circumstances is a high one. It is the policy of the law that no person's property should be burdened with the interest of another in the absence of the clearest proof. What the law requires is an intention to create a trust expressed in clear language. (p 764 h)

[8] It not open to a court to disregard the corporate personality of a limited company save in very exceptional circumstances. A litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere façade concealing the true facts. In the present instance, nowhere in the plaintiffs' case is there any attempt to show that special circumstances exist indicating that the 1st defendant is a mere facade concealing the true facts. (p 766 c-d)

[Orders of trial judge set aside.]

*[**Bahasa Malaysia** Translation of Headnotes*

Plaintif-plaintif merupakan dua syarikat sendirian berhad di bawah kawalan seorang bernama Mohamed Aly Rangoonwala, ("Rangoonwala"). Satu perjanjian usahasama telah dimasuki di antara tiga pihak. Salah satu pihak adalah defendan pertama, Perman Sdn Bhd, sebuah syarikat sendirian berhad yang mana sahamnya dimiliki sama rata oleh seorang bernama Raja Zainal dan isterinya, Tengku Zaidah. Dua lagi pihak kepada perjanjian usahasama tersebut adalah plaintif kedua dan sebuah syarikat bernama Kumpulan Fima Sdn Bhd. Lanjutan daripada perjanjian usahasama tersebut, sebuah syarikat yang bernama Fimaly Bulking Services Sdn Bhd ("Fimaly") telah diperbadankan. 3% daripada saham Fimaly telah dipegang oleh defendan pertama. Pegangan sebanyak 3% oleh defendan pertama itu berjumlah 149,999 saham. Satu lagi saham dipegang oleh Raja Zainal. Rangoonwala mengatakan bahawa oleh kerana Raja Zainal tiada wang untuk melanggan saham dalam Fimaly, Rangoonwala sendiri telah melalui plaintif-plaintif, memberikan Raja Zainal RM150,000 untuk membayar

kepada Fimaly bagi 150,000 saham tersebut. Raja Zainal telah membayar RM150,000 ini ke dalam akaun defendan pertama. Defendan pertama kemudiannya telah membayar untuk saham tersebut dan telah menjadi pemilik berdaftar 149,000 saham dalam Fimaly.

Pada 1 September 1986, satu "Memorandum Perjanjian" telah ditandatangani di antara plaintif-plaintif dan Raja Zainal melalui syarikat induknya Perman Holdings (dirujuk sebagai R.Z.) yang mana telah menyatakan bahawa R.Z. memegang 150,000 saham bernilai M$1 setiap satu yang berjumlah M$150,000 yang merupakan nilai berbayar di dalam Fimaly. Memorandum Perjanjian tersebut menyatakan bahawa pelaburan sebanyak M$150,000 ini telah dibubuh di dalam nama R.Z. oleh plaintif-plaintif dan bahawa R.Z. mempunyai pilihan, dalam tempoh dua puluh empat bulan yang berikutnya untuk membeli balik saham-saham tersebut pada nilai par berserta faedah. Memorandum Perjanjian tersebut selanjutnya memperuntukkan bahawa sekiranya R.Z. mengambil keputusan yang dia tidak berminat membeli saham-saham tersebut dalam tempoh dua puluh empat bulan yang berikutnya, saham-saham tersebut boleh diurusniagakan oleh plaintif-plaintif dan R.Z. tidak perlu membayar apa jua amaun.

Pada 28 Januari 1993, Raja Zainal dan isterinya telah meninggal dunia dalam satu kemalangan. Defendan-defendan ke-2 hingga ke-4 kemudiannya telah dilantik sebagai wakil-wakil diri harta pesaka Raja Zainal. Defendan-defendan ke-3 dan ke-4 sebelum perlantikan mereka sebagai wakil-wakil diri, telah menandatangani satu pengisytiharaan amanah ke atas saham-saham Fimaly dan telah juga menyerahkan borang-borang proksi yang telah ditandatangani dan borang pindahmilik saham yang kosong kepada Rangoonwalla. Saham-saham Fimaly tersebut kemudiannya telah dijual untuk satu jumlah wang yang agak lumayan yang mana telah bersama faedahnya dibayar ke dalam mahkamah. Plaintif-plaintif telah berhujah bahawa Raja Zainal telah memegang saham-saham Fimaly di bawah satu amanah yang nyata atau secara alternatifnya satu amanah konstruktif. Tuntutan berkenaan dengan amanah konstruktif tersebut adalah berdasarkan alasan bahawa plaintif-plaintif telah memberikan wang untuk membeli saham-saham Fimaly tersebut. Defendan-defendan mengatakan bahawa tiada amanah di sini tetapi hanya satu hutang untuk yang mana harta pesaka Raja Zainal boleh menjadi bertanggungjawab. Hakim perbicaraan telah menemui untuk plaintif-plaintif dan telah memutuskan bahawa saham-saham Fimaly tersebut telah dipegang dalam amanah oleh Raja Zainal. Hakim perbicaraan telah menemui berpihak kepada plaintif-plaintif berdasarkan satu amanah yang nyata, dan dalam alternatifnya, satu amanah tersirat, yang mana adalah nama lain bagi amanah berbangkit. Defendan-defendan telah merayu terhadap keputusan itu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:

[1] Hanya pemilik sesuatu harta itu boleh mengisytiharkan dirinya sebagai pemegang amanah. Pemilik sebenar saham-saham Fimaly tersebut adalah Perman Sdn Bhd, defendan pertama dan bukannya Raja Zainal. Jadi, sekiranya ada sesiapa yang perlu menjadi pemegang amanah saham-saham Fimaly tersebut, ianya mestilah defendan pertama dan bukannya sesiapa yang lain. Ini adalah kerana tiada sesiapapun, termasuk Raja Zainal yang mempunyai kuasa untuk mengisytiharkan dirinya sebagai pemegang amanah untuk harta orang lain; dalam kes ini defendan pertama. Ini memandangkan sebuah syarikat itu adalah satu entiti yang berasingan daripada pemilik sahamnya. Pemilik-pemilik saham tidak mempunyai kepentingan, sama ada dari segi undang-undang atau benefisial ke atas harta syarikat.

[2] Tiada sebarang keterangan yang menunjukkan bahawa defendan pertama pada bila-bila masa telah mengisytiharkan dirinya sebagai pemegang amanah untuk plaintif-plaintif berkenaan dengan saham-saham Fimaly tersebut.

[3] Keterangan plaintif-plaintif sendiri adalah bahawa wang telah diberikan kepada Raja Zainal yang telah membayarnya ke dalam akaun defendan pertama. Lanjutan daripada ini, defendan pertama telah membayar wang-wang tersebut kepada Fimaly, dan telah diberikan saham-saham Fimaly dan telah menjadi pemilik berdaftar saham-saham tersebut. Oleh yang demikian, doktrin amanah berbangkit tidak terpakai kepada fakta-fakta kes ini. Satu-satunya inferens yang munasabah yang boleh dibuat daripada fakta-fakta yang telah dibuktikan dan diakui ialah ini adalah sebetulnya satu kes hutang dan bukannya satu amanah yang nyata. Merujuk kepada Memorandum bertarikh 1 September 1986, tiada apa-apa di dalamnya yang menjadikan Raja Zainal sebagai pemegang amanah mana-mana harta. Ia hanya mengesahkan fakta bahawa RM150,000 tersebut adalah satu pendahuluan daripada plaintif-plaintif kepada Raja Zainal.

[4] Untuk defendan pertama menjadi bertanggungjawab kepada plaintif-plaintif untuk saham-saham Fimally tersebut, RM150,000 yang telah dibayar kepada Raja Zainal oleh plaintif-plaintif mestilah wang-wang amanah yakni ianya mestilah secara khususnya bertujuan untuk digunakan untuk membeli saham-saham Fimaly tersebut. Sekiranya tujuan tersebut telah gagal satu amanah berbangkit akan berbangkit berpihak kepada plaintif-plaintif. Di sini, Raja Zainal telah didahulukan RM150,000 tersebut untuk tujuan khusus bagi digunakan untuk membeli saham-saham Fimaly tersebut. Jadi dia adalah seorang pemegang amanah bagi wang tersebut. Ini dikenali sebagai amanah "Quistclose". Dalam keadaan tersebut, sekiranya wang tersebut telah digunakan untuk tujuan selain daripada membeli saham-saham Fimaly, itu

akan merupakan satu pecah amanah oleh Raja Zainal. Ini akan membolehkan plaintif-plaintif mengesan wang tersebut ke dalam produk yang wujud dari pecah amanah. Dan, sekiranya defendan pertama telah secara tidak jujur membantu Raja Zainal dalam pecah amanah itu, maka ianya akan menjadi bertanggungjawab sebagai fidusiari dengan satu kewajipan untuk menunjukkan akaun bagi wang amanah itu. Tetapi RM150,000 tersebut telah sememangnya digunakan untuk tujuan untuk mana ianya telah dibayar kepada Raja Zainal.

[5] Penambahan kepada prinsip Quistclose adalah apabila tujuan, untuk yang mana wang yang berkenaan itu didahulukan, telah dicapai, pemilikan benefisial dalam wang itu akan terletakhak secara sepenuhnya pada sipenerima yang diniatkan itu, di dalam kes ini, defendan pertama. Dan apabila saham-saham tersebut didaftarkan dalam nama defendan pertama, ianya telah menjadi pemilik benefisial yang tunggal bagi saham-saham tersebut. Selepas itu tiada sesiapapun yang mempunyai hak untuk berurusan dengan mereka. Pendahuluan kepada Raja Zainal oleh plaintif-plaintif adalah secara sebenarnya dan sememangnya satu pinjaman.

[6] Amanah sementara yang utama itu yang bertujuan membeli saham-saham Fimaly tersebut telah dijalankan dan dengan itu berakhir dalam satu perhubungan pinjaman semata-matanya. Oleh yang demikian, tiada amanah berbangkit.

[7] Beban untuk membuktikan bahawa satu amanah yang nyata wujud dalam sesuatu keadaan yang diberikan itu adalah agak tinggi. Ini adalah kerana, adalah polisi undang-undang bahawa tiada harta sesiapapun yang boleh dibebankan dengan kepentingan orang lain dalam ketiadaaan bukti yang amat jelas. Apa yang diperlukan oleh undang-undang adalah satu niat untuk mewujudkan satu amanah yang dinyatakan dalam bahasa yang jelas.

[8] Adalah tidak terbuka kepada mahkamah untuk tidak mengendahkan keperibadian korporat sesebuah syarikat sendirian berhad itu kecuali dalam keadaan luar biasa. Seseorang litigan yang menuntut pencelahan mahkamah untuk menembusi tirai korporat mestilah membuktikan keadaan khas yang menunjukkan bahawa syarikat tersebut hanyalah satu dalih yang menyembunyikan fakta sebenarnya. Dalam kes ini, tiada di mana-mana dalam kes plaintif-plaintif terdapat apa-apa percubaan untuk menunjukkan bahawa keadaan khas wujud yang menunjukkan bahawa defendan pertama hanyalah satu dalih yang menyembunyikan fakta sebenarnya.

Perintah hakim perbicaraan diketepikan]

Case(s) referred to:
Bannister v. Bannister [1948] 2 All ER 133
Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567
Dubai Aluminium Ltd v. Salaam [2002] UKHL 48
ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA
Hon Kon Kim v. Betsy Lim Gek Kim [2001] 4 SLR 340
Law Kam Loy v. Boltex Sdn Bhd [2005] 3 CLJ 355 CA
Macaura v. Northern Assurance Co Ltd & Ors [1925] AC 619
Royal Brunei Airlines v. Tan [1995] 3 WLR 64
Twinsectra Ltd v. Yardley [2002] 2 AC 164
Westdeutsche Landesbank Girozentrale v. Islinton LBC [1996] AC 669
Wong Siew Choong Sdn Bhd v. Anvest Corpn Sdn Bhd [2002] 3 CLJ 409 CA
Woolfson v. Strathclyde Regional Council [1978] SLT 159

Legislation referred to:
Companies Act 1965, s. 35

Other source(s) referred to:
Hayton & Marshall's, *Commentary & Cases on the Law of Trusts & Equitable Remedies*, 10th edn

For the appellants - Joginder Singh (Zaitoon Othman with him); M/s Zaitoon Othman & Assoc
For the respondents - Porres P Royan (M Nagarajah & Lau Kee Sern with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-385-1996]

Reported by Amutha Suppayah

JUDGMENT

Gopal Sri Ram JCA:
This appeal was originally argued before a differently constituted Bench comprising PS Gill, Rahmah Hussein JJCA and me. Since the argument could not be completed, the appeal was adjourned to a date to be fixed. In the interim, due to supervening events the Bench that originally heard the appeal could no longer complete the hearing. Accordingly, a hearing de novo was ordered. It is pursuant to the order that the appeal has now come to be heard before us.

The facts of this case are uncomplicated. In their narration I shall, for convenience, refer to the parties according to their titles in the court below. The plaintiffs are two private limited companies. The evidence in the court below was that they are under the control of a man by the name of Mohamed Aly Rangoonwala, ("Rangoonwala") a British subject of Pakistani origin. I am not entirely sure how this element of control is relevant to the issues at hand.

Rangoonwala was a close friend and business associate of one Raja Dato' Haji Zainal Abidin ("Raja Zainal"), now deceased. He wanted to go into business with Raja Zainal. This is the way in which they went about it.

A joint venture agreement dated 22 August 1979 was entered into between three parties. One of them was the 1st defendant, Perman Sdn Bhd. I had better say something about it straightaway. It is private limited company whose shareholding was held equally by Raja Zainal and his wife, Tengku Zaidah. It was incorporated on 26 February 1981, that is to say, about 18 months after the joint venture agreement. So, it was not in existence when the joint venture agreement was executed. The effect of that is spelt out in s. 35 of the Companies Act 1965 which says:

> (1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.
>
> (2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof.

There is nothing to show that the 1st defendant had ratified the joint venture agreement. Neither is there any evidence to suggest the contrary express agreement required by subsection (2). It follows, in accordance with the terms of s. 35, that the joint venture agreement is to be treated as binding Raja Zainal personally as its executant.

The other two parties to the joint venture agreement were the 2nd plaintiff and a company called Kumpulan Fima Sdn Bhd, the 9th defendant in the court below. But it is not a party to the present appeal. Consequent upon the joint venture agreement, a company called Fimaly Bulking Services Sdn Bhd ("Fimaly") was incorporated. It was the 8th defendant in the court below but is also not a party to this appeal. 51% of the shares of Fimaly were held by the 9th defendant whilst the 2nd plaintiff and the 1st defendant held 46% and 3% respectively. The 1st defendant's 3% stake amounted 149,999 shares. The remaining 1 share was held by Raja Zainal. It is common ground that Raja Zainal had no money to subscribe for the shares in Fimaly. Rangoonwalla's evidence is that it was he, through the plaintiffs, who provided Raja Zainal with RM150,000 to pay Fimaly for the 150,000 shares. Raja Zainal paid this RM150,000 into the 1st defendant's account. The 1st defendant then paid for the shares and became, the registered shareholder of the 149,000 shares of Fimaly.

Later, on 1 September 1986, Raja Zainal executed a document which says this:

> Memorandum of Agreement Between European Commodities Limited/ European Commodities Sdn Bhd (referred to as E.C.) and Raja Zainal bin Raja Haji Ahmad through his holding company Perman Holdings (referred to as R.Z.)
>
> 1. R.Z. is holding 150,000 shares at M$1.00 each for a total of M$150,000 being paid up value in Fimaly Bulking Sdn. Bhd.
>
> 2. This investment of M$150,000 has been put in R.Z.'s name by E.C. on the following terms and conditions.
>
> a) R.Z. has the option, within the next twenty four months (i.e. till September 1, 1988) to buy out these shares at par value plus actual interest agreed between European Commodities Limited and European Commodities Sdn. Bhd., which rates have been duly approved by Bank Negara, Malaysia.
>
> b) If R.Z. decides he is not interested in buying these shares within the next twenty-four months as detailed at 'a' above, then these shares will be at the disposal of E.C. and R.Z. has not to pay any amount whatsoever.

On 28 January 1993, Raja Zainal and his wife both died in a tragic accident at sea. The 2nd to 4th defendants were later appointed as personal representatives of Raja Zainal's estate while the 5th to 7th defendants were appointed as personal representatives of his wife's estate. It is in evidence that the 3rd and 4th defendants prior to their appointment as personal representatives, executed a declaration of trust over the Fimaly shares and also delivered executed proxy forms and blank share transfers to Rangoonwalla. It is also in evidence that the Fimaly shares were later sold for a considerable sum of money which sum with interest has been paid into court.

The plaintiffs' case in the court below was that Raja Zainal held the Fimaly shares under either an express or alternatively a constructive trust. The latter claim of constructive trust was grounded on the plaintiffs having provided the purchase price for the Fimaly shares. That, of course, is a wholly misconceived claim. And I will explain why although it is a digression from the mainstream in this case because it is a point of such fundamental importance.

When A provides the whole of the purchase price for real or personal property but has that property registered in B's name, there is a resulting trust in A's favour. Here equity presumes an intention in A that the property is not to belong beneficially to B. The leading authority on the point is *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, where Lord Browne-Wilkinson said:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trusts and Trustees*, pp. 317 et seq.; *Vandervell v. Inland Revenue Commissioners* [1967] 2 AC 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid.* and *Quistclose Investments Ltd. v. Rolls Razor Ltd (In Liquidation)* [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. **A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.** Megarry J in *In re Vandervell's Trusts (No. 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia: see *In re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch. 1. (emphasis added.)

By contrast, a constructive trust is imposed by operation of law, that is to say, it overrides the intention of the parties. A true constructive trust exists only in a limited number of cases. It is not relevant for present purposes to list all of them here. Suffice if I give two fairly obvious examples. The first is where there is a valid and binding contract for the sale of land in which case equity imposes a constructive trust upon the vendor. (See, *Wong Siew Choong Sdn Bhd v. Anvest Corpn Sdn Bhd* [2002] 3 CLJ 409, per Abdul Kadir Sulaiman JCA). The second is where there is a failure of formalities to create a trust and the party asserting absolute title against the beneficial owner is using statute as an engine of fraud. See, *Bannister v. Bannister* [1948] 2 All ER 133; *Hon Kon Kim v. Betsy Lim Gek Kim* [2001] 4 SLR 340. The hallmark of a genuine constructive trust is that the constructive trustee has title to the property that is the subject matter of the litigation or claims the right to deal with that property on behalf of the beneficial owner.

This brings into sharp focus a proposition central to the law of trusts. It is this. All trustees are fiduciaries but not all fiduciaries are trustees. Unlike a constructive trustee, a fiduciary holds his title to property not in favour of the beneficiary but adverse to him or her and is accountable in equity to the true owner. This proposition, not properly appreciated, with respect, even by Lord Browne-Wilkinson in the *Westdeutsche* case, was brought home with clarity by Lord Millett in *Dubai Aluminium Ltd v. Salaam* [2002] UKHL 48. He said:

> Unlike HB in *Mara*'s case, Mr Amhurst did not assume the position of a trustee on behalf of others. **He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them.** He acted throughout on his own or his confederates' behalf. The claim against him is simply that he participated in a fraud. **Equity gives relief against fraud by making any person sufficiently implicated in the fraud accountable in equity.** In such a case he is traditionally (and I have suggested unfortunately) described as a 'constructive trustee' and is said to be 'liable to account as a constructive trustee'. **But he is not in fact a trustee at all, even though he may be liable to account as if he were.** He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant. He is not a fiduciary or subject to fiduciary obligations; and he could plead the Limitation Acts as a defence to the claim.
>
> In this second class of case the expressions 'constructive trust' and 'constructive trustee' create a trap. As Jules Sher QC, sitting as a deputy judge of the Chancery Division, recently observed in *Coulthard v. Disco Mix Club Ltd* [1999] 2 All ER 457 at 479, [2000] 1 WLR 707 at 731 this 'type of ... trust is merely the creation by the court ... to meet the wrongdoing alleged: there is no real trust and usually no chance of a proprietary remedy'. The expressions are 'nothing more than a formula for equitable relief' (see *Selangor United Rubber Estates Ltd v. Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungoed-Thomas J). I think that we should now discard the words 'accountable as constructive trustee' in this context and substitute the words 'accountable in equity'.

It is this failure on the part of the plaintiffs to distinguish between a true constructive trust, a resulting trust and a duty to account in equity as a fiduciary that caused them to be led astray when addressing the trial judge on this issue. Be that so, it is to be noted that the trial judge found for the plaintiffs on the basis of an express, and in the alternative, an implied trust, which is another name for the device of the resulting trust.

Returning now to the mainstream. the defendants' case in the High Court was that there was not a trust here but merely a debt for which the estate of Raja Zainal may be liable. After a trial at which viva voce evidence was led, the trial judge found for the plaintiffs and held that the Fimaly shares were held on trust by Raja Zainal. He said:

> In any event, where there is a purchase in the name of another, a trust is often implied (see the *Law of Trusts* by LA Sheridan 12th Edition at page 111/112) and it would appear to apply not only to trusts of real property but the principle applies to personalty. In other words, the law of trusts recognises that what started out as a loan may nonetheless amount to a trust which conferred beneficial rights upon the party (*Spencer v. Brown* [1987] 18 Fam Law 291).
>
> I therefore was of the view that the evidence adduced by the Plaintiffs more than justify for a finding by me that there was a trust in favour of the Plaintiffs in respect of the said shares registered under the name of Raja Zainal and Perman. In other words the Plaintiffs are the beneficial owners of the said shares.

The defendants have appealed against that decision.

When the case was first argued before the earlier Bench, it occurred to me that the issue of whether there was a trust or a debt was not the central issue in this case. The real question is: who was the true owner of the Fimaly shares? For it is only the owner of property who may declare himself as trustee. All in the court below appear to have proceeded on the basis that Raja Zainal was the true owner. But that, I think, with respect, is imitating Nelson at Trafalgar – turning a blind eye to reality. It is for this reason that arguments could not be completed at the earlier hearing as counsel had to be afforded an opportunity to deal with the "missed" point.

Looking at the undisputed facts, there is no doubt whatsoever that the true owner of the Fimaly shares was Perman Sdn Bhd, the 1st defendant: not Raja Zainal. So if anyone was to be a trustee of the Fimaly shares it must be the 1st defendant and nobody else. For no one, including Raja Zainal had the power to declare himself a trustee of someone else's property; in this instance the 1st defendant. It has to do with a principle which lies at the heart of company law. It is that a company is a separate person from its shareholders. The latter have no interest, legal or beneficial over the property of the former. As Lord Buckmaster said in *Macaura v. Northern Assurance Co Ltd & Ors* [1925] AC 619:

> Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the Company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

There is not a jot of evidence that the 1st defendant ever declared itself a trustee of the plaintiffs in respect of the Fimaly shares. In my judgment, there remain only two questions on the facts established at the trial and on the pleaded cases. First, whether the 1st defendant is a trustee of the Fimaly shares under a resulting trust; second, whether the 1st defendant is under a duty to account for the Fimaly shares as a fiduciary.

Let me take the first point. The plaintiff's own evidence is that the money was handed to Raja Zainal who paid it into the 1st defendant's account. Following this, the 1st defendant paid those monies to Fimaly, was issued Fimaly shares and became the registered owner of those shares. It is not the plaintiffs' case that they purchased the Fimaly shares but had those shares registered in the 1st defendant's name as nominal owner. It follows that the doctrine of a resulting trust has no application to the facts of this case. Indeed, I would agree with learned counsel for the defendants, Mr Joginder Singh, that the only reasonable inference that is to be drawn from the proved and admitted facts is that this is in reality a case of a debt and not an express trust. Looking at the Memorandum of 1 September 1986, there is nothing in it that constitutes Raja Zainal as trustee of any property. It merely confirms the fact that the RM150000 was an advance from the plaintiffs to Raja Zainal.

Next, the second point. In the context of the present case, for the 1st defendant to be accountable to the plaintiffs for the Fimally shares, the RM150,000 paid to Raja Zainal by the plaintiffs must be trust monies in the sense that it was to be used for the specific purpose of purchasing the Fimaly shares. If the purpose had failed there would have been a resulting trust in the plaintiffs' favour. Here, Raja Zainal was advanced the RM150000 for the specific purpose of using it to acquire the Fimaly shares. So he was a trustee of the money. This is called a "Quistclose" trust, taking its name from the leading case on the point, *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567. In those circumstances, if the money had been used for some purpose other than the purchase of Fimaly shares, that would amount to a breach of trust by Raja Zainal. This would entitle the plaintiffs to trace the money into the product of the breach of trust. And, if the 1st defendant (confining myself to the present facts) dishonestly assisted Raja Zainal in the breach, then it would be liable as a fiduciary with a duty to account for the trust money. See, *Royal Brunei Airlines v. Tan* [1995] 3 WLR 64; *Twinsectra Ltd v. Yardley* [2002] 2 AC 164. But that is not what happened here. The RM150,000 was in fact used for the very purpose for which it was paid over to Raja Zainal. That brings me to the rider to the Quistclose principle. It is that once the purpose for which the money was advanced is achieved, the beneficial ownership in the money vests absolutely in the intended recipient, in this case, the 1st defendant. And when the shares were registered in the name of the 1st

defendant, it became the sole beneficial owner of those shares. Thereafter no other person had any right to deal with them. This approach reinforces my earlier conclusion that the advance to Raja Zainal by the plaintiffs was in truth and fact a loan.

In this context, it is useful to quote the following passage from Hayton & Marshall's *Commentary & Cases on the Law of Trusts & Equitable Remedies* (10th edn.) which establishes the point I seek to make:

> Where property is purchased with the aid of X's moneys it is vital whether X paid over the moneys as purchaser or lender. If X provided £5,000 of a £l00,000 purchase price of a house put in Y's name then if X lent the £125,000 he is only entitled as a personal creditor to the £25,000 and any agreed interest, whereas if he provided the £25,000 as purchaser he is entitled to a quarter share in the house. Loan and purchase by way of resulting trust are thus mutually exclusive though in an exceptional case *a loan arrangement may commence as a primary temporary trust to carry out a purpose which, if carried out, results in a pure loan relationship but which, if not carried out, gives rise to a secondary final express or resulting trust* as in *Barclays Bank Ltd v. Quistclose Investments Ltd*. (emphasis added.)

So too here. The primary temporary trust for the purpose of acquiring the Fimaly shares was carried out thereby resulting in a pure loan relationship. Accordingly there was no resulting trust.

Mr Royan for the defendants sought to argue that there was a third possible basis on which the 1st defendant could be made liable as a trustee of the Fimaly shares, namely, agency. In order for that argument to succeed it must be established that Raja Zainal, acting as agent for the 1st defendant declared the 1st defendant to be trustee of the Fimaly shares. But that is not at all the case here. What you have is a document; the memorandum dated 1 September 1986, which does not even constitute Raja Zainal as trustee. Indeed, the word "trust" or equally compelling language is absent in that document. There is nothing in that document or the surrounding circumstances that goes to affirmatively show a clear intention to create a binding declaration of a trust on the part of the 1st defendant which is the true owner of the Fimaly shares.

The standard of proving that an express trust exists in given circumstances is a high one. For, it is the policy of the law that no person's property should be burdened with the interest of another in the absence of the clearest proof. What the law requires is an intention to create a trust expressed in clear language. Quite recently we had to deal with this very issue. It was in *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674. We there said:

15. There is one other point. In his written outline of submission, learned counsel for the plaintiff has argued that it is for the defendant to prove beyond a reasonable doubt that a trust exists. In support he relies on the decision of the Court of Appeal of the *Federated Malay States in Hameeda Bee v. Mrs P Seenivasagam* [1950] MLJ 267. The actual ratio of that case is accurately summed up in the headnote of the report, namely, 'that clear and unequivocal language must be used to establish a trust'. However, in his brief judgment Pretheroe Ag CJ, quoted the following passage from the judgment of Viscount Cave LC in *Po Kin & Anor v. Po Shein* AIR [1926] PC 77:

> But on the other side there are also some most important facts. To begin with, and this no doubt is the most important of all, all this property stood in the name of the deceased; and on some of the documents it is stated that the deceased (apparently the deceased in person) paid the money. Of course the burden is on the appellant to displace the natural inference to be drawn from that fact. The burden is no doubt a difficult one to discharge, because in all these benamidar transactions the very object of the parties is secrecy; but still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt.

It is apparent from that passage that the learned Lord Chancellor was merely referring to a set of circumstances where a plaintiff claims to be the true owner of property registered in the name of the defendant and apparently paid for by the defendant. In our judgment, that passage has no relevance whatsoever to the facts of the present instance. Further, we do not think by the phrase 'beyond reasonable doubt' the Lord Chancellor was imposing the criminal standard of proof in those circumstances. He was merely emphasising the high degree of proof demanded by the circumstances postulated by him.

To sum up, my views on this case are as follows:

(i) the 1st defendant was the true owner of the 150,000 Fimaly shares;

(ii) Raja Zainal had no authority in law to attempt to deal with the 1st defendant's property, namely the Fimally shares;

(iii) neither the memorandum of 1 September 1986, nor the surrounding circumstances support an intention by the 1st defendant to create an express trust over the 150,000 Fimally shares;

(iv) the proved and admitted facts do not establish the requirements of a resulting trust of the Fimally shares in the plaintiffs' favour;

(v) the 1st defendant is not a fiduciary of the 150,000 shares and owes no duty to account for them or their proceeds to the plaintiff;

(vi) on the proved and admitted facts this is a case of a personal debt owed by Raja Zainal to the plaintiffs. The 1st defendant is not a trustee for the plaintiffs of the Fimaly shares.

I must add that the trial judge proceeded on the alternative footing of an express trust based on a deed of trust signed by two of the three personal representatives of the estate of Raja Zainal. But that document is not worth the paper on which it was written because the estate of Raja Zainal has no business to deal with the property of the 1st defendant.

Before concluding I would draw attention to the fact that it not open to a court to disregard the corporate personality of a limited company save in very exceptional circumstances. In the very recent case of *Law Kam Loy v. Boltex Sdn Bhd* [2005] 3 CLJ 355 I ventured to collect and discuss some of the authorities which, in my view, represent the current jurisprudence in this area of the law. I find it unnecessary to repeat what I there said. Suffice to say that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts. See, *Woolfson v. Strathclyde Regional Council* [1978] SLT 159. In the present instance, nowhere in the plaintiffs' case is there any attempt to show that special circumstances exist indicating that the 1st defendant is a mere facade concealing the true facts.

For the reasons already given, I would allow this appeal and set aside the orders of the trial judge. I would also enter judgment for the defendants and dismiss the plaintiff's action. The plaintiffs must pay the costs of this appeal and those incurred in the High Court. The deposit in court shall be refunded to the defendants.

My learned brother Hashim bin Dato' Yusoff JCA and my learned sister Zaleha Zahari JCA have seen this judgment in draft and have expressed their agreement with it.